(23)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 789

MITSUBISHI SHOJI KAISHA, LTD., a corporation, GENERAL PETROLEUM CORPORATION OF CALIFORNIA, a corporation, ROYAL INDEMNITY COMPANY, a corporation, and HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation,
Petitioners (Appellants Below),

—against—

SOCIETE PURFINA MARITIME, a corporation,
Respondent (Appellee Below).

BRIEF ON BEHALF OF RESPONDENT.

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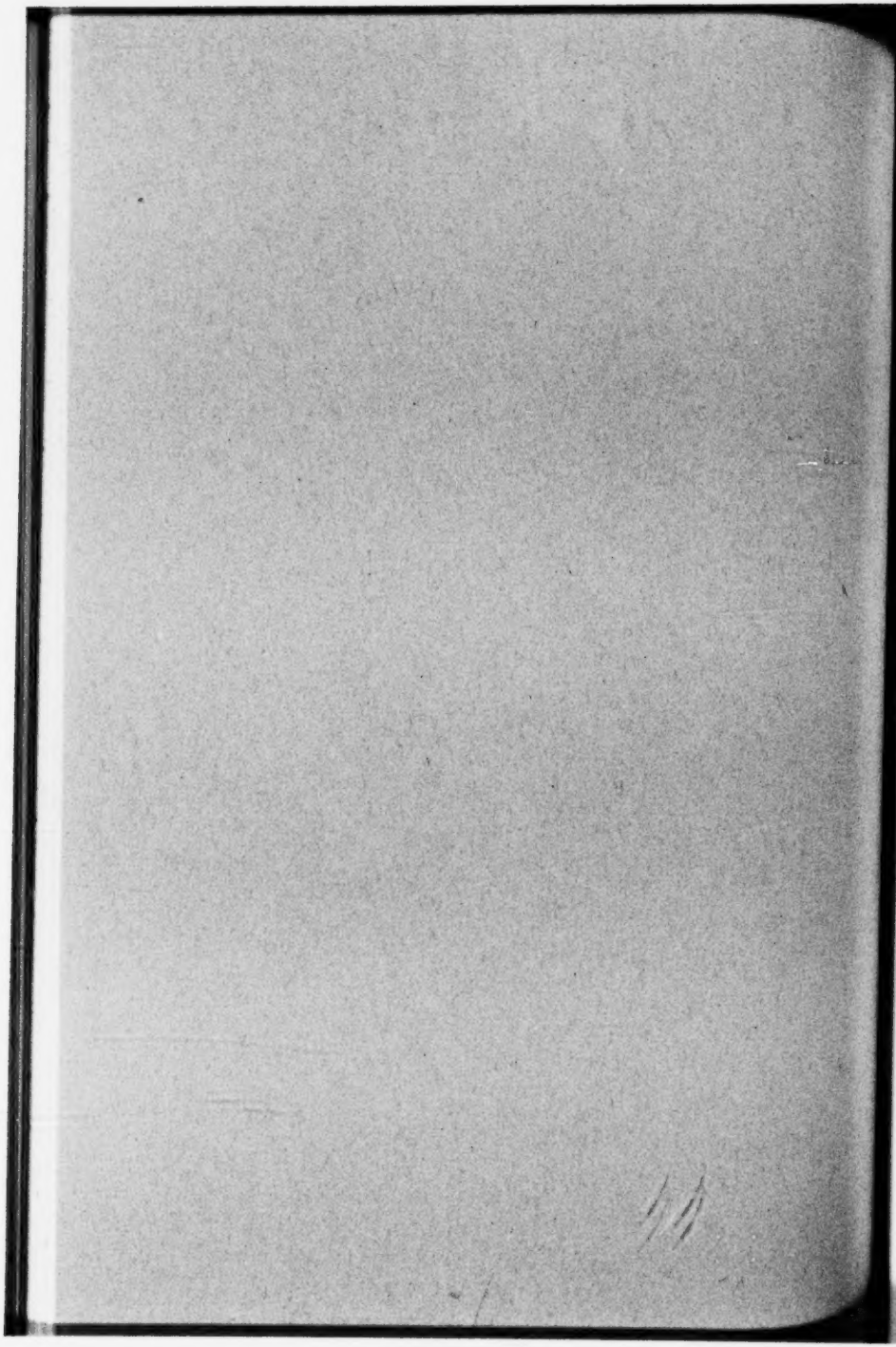

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BRIEF ON BEHALF OF RESPONDENT.

Statement.

The statement (of the case) in the petition is inadequate. Rather than extend this brief by a restatement, we refer the Court to the clear and concise statement of the case given in the opinion of the Circuit Court of Appeals (R. 745-770).

The Courts Below Concurrently Found the Facts Against the Petitioners.

The District Court in deciding the many issues of fact and law presented by the case, filed no less than forty-six findings of fact (R. 99-117) and thirteen

conclusions of law (R. 118-122). The findings of fact are accepted by the Circuit Court of Appeals (R. 745-770), and there is no disagreement between the two Courts as to the conclusions of law, except as to the assessment of interest and costs against the petitioner General Petroleum Corporation.

Decree of the District Court.

The decree of the District Court (R. 123-126) awarded freight money to Purfina* as follows: against Mitsubishi in the full amount of the freight money, with interest and costs; against General Petroleum and Royal, claimant of, and stipulator for release of, the cargo, respectively, in the sum of $64,000 (the amount of the stipulation) under the charter party clause giving a lien on the cargo for freight; with interest on said $64,000. against Royal from the date of the decree and against General Petroleum from December 19, 1940, when it filed exceptions to the libel and thereby contested Purfina's suit for the freight money. The decree provided that the aggregate sum to be recovered by Purfina from all parties should not in any event exceed the total amount awarded by the decree against Mitsubishi. The decree dismissed the cross-libel of Mitsubishi against Purfina and the "Laurent Meeus".

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* Following the abbreviations of the petition and of the opinion of the Circuit Court of Appeals, we shorten respondent Societe Purfina Maritime to Purfina, petitioners Mitsubishi Shoji Kaisha, Ltd., to Mitsubishi, General Petroleum Corporation of California to General Petroleum, and Royal Indemnity Company to Royal.

Decree of the Circuit Court of Appeals.

From this decree Mitsubishi and the other petitioners appealed. The Circuit Court of Appeals affirmed the decree of the District Court in every respect except the award of interest from the date of contest to the date of the decree against General Petroleum. The decree was modified by striking out this item of the recovery (R. 771).

The Circuit Court of Appeals, after concurring in the Findings of Fact of the District Court (R. 750-766) held, as had the District Court, that the charter party provided that the freight was to be paid, ship lost or not lost (R. 746), and that, despite the ultimate frustration of the voyage, Purfina was entitled to this freight and was not liable for any damages to Mitsubishi under principles of law long settled by this Court. (*The Allanwilde,* 248 U. S. 377; *The Gracie D. Chambers,* 248 U. S. 387; *The Bris,* 248 U. S. 392; *The Malcolm Baxter, Jr.,* 277 U. S. 323.)

Petitioners Do Not Present Any Conflict of Decisions Between the Circuit Court of Appeals and This Court or the Courts In Any of the Other Circuits.

The questions raised are either pure questions of fact or mixed questions of law and fact, where the law is settled by decisions of this Court. It is noteworthy that the petitioners, after enumerating nineteen so-called questions of law, follow that enumeration with twenty-three Specifications of Error to be urged, just as if they were presenting an appeal to this Court, rather than a Petition for

a Writ of Certiorari where questions of conflict between the decision below and other decisions are presented to this Court for the purpose of avoiding confusion in the law (Rule XXXVIII—(5)). In short, even a cursory reading of these so-called questions and Specifications of Error make it apparent that what petitioners are endeavoring to do is to induce this Court to review a lengthy record where the District Court (R. 99-117) and the Circuit Court of Appeals (R. 745-796) concurred as to the facts. It is settled by numerous decisions of this Court that such findings will not be disturbed. *Just* v. *Chambers*, 312 U. S. 383, 385.

The Principles of Law Sought to Be Reviewed Are Well Settled By Decisions of This Court.

The suit instituted by Purfina against Mitsubishi was for recovery of freight under a charter party which contained the following clause:

> "2. The Freight to be paid in cash in New York less 1% discount on telegraphic advice of signing Bills of Lading and is to be considered earned and not returnable ship and/or cargo lost or not lost" (R. 18).

Both Courts below found that all the conditions precedent to Purfina's right to recover the freight money had been performed (Finding XXXII, R. 112, 764), and that the freight was due and payable. On this finding the Circuit Court of Appeals held that the right of Purfina to the freight was settled by the decision of this Court. *The Allanwilde*, 248 U. S. 377; *The Gracie D. Chambers*, 248 U. S. 387; *The Bris*, 248 U. S. 392; *The Malcolm Baxter, Jr.*, 277 U. S. 323.

As to the various charges of error on the part of the Courts below contained in petitioners' brief, it is sufficient to point out that on October 3rd, the day after loading was completed, Mitsubishi was informed as to the loaded quantity of cargo, the bill of lading figures (Finding XV, R. 107), and on the next day the supplier had sent it signed copies of the bills of lading. On October 11th, Purfina formally gave telegraphic notice of the signing of bills of lading (Finding XVII, R. 107). It was also found that the bills of lading were prepared by General Petroleum Corporation, one of the petitioners herein, pursuant to Mitsubishi's instructions (Finding XI, R. 105-106). Criticism of the opinion below and of the finding (Finding XXXII, R. 112) that Purfina had complied with all conditions precedent as to its right to recover freight money, is without substance. Both Courts also found that the charges of unseaworthiness were unsustained, and that the "Laurent Meeus" was in fact seaworthy (Findings XXXVI-XXXVII, R. 112-114). The Circuit Court of Appeals concurred in these findings of the District Court (R. 752-766).

The Courts below correctly understood *National Steam Navigation Co., Ltd. of Greece* v. *International Paper Co.*, 241 Fed. 861, and applied it correctly. It is true that in that case there was a clause expressly providing that the freight was earned upon shipment of the cargo, but the Court put the shipowner's right to collect freight under the prepaid freight clause not solely upon that ground but also upon the broader ground that the primary intention running through the whole bill of lading was that the freight was intended to be earned upon the loading of the cargo and that this is the general rule

under the prepaid freight clause. Shipowners collected and retained freight under the prepaid freight clause in *The Gracie D. Chambers,* 248 U. S. 387, where there was no express provision that the freight was earned upon loading of the cargo, and the same principle was applied in *Portland Flouring Mills Co.* v. *British and Foreign Marine Insurance Co., Ltd.,* 130 F. 860 (certiorari denied, 195 U. S. 629), and *The Quarrington Court,* 122 F. (2d) 266. Thus both courts correctly held in accordance with the recognized rule that the freight was earned when the cargo was loaded and the bill of lading signed. It would therefore have made no difference in the result if, as petitioners seem to contend, the voyage was frustrated on October 2nd, for the frustration would have followed the loading, but both courts have also held that the Governmental interference of October 2nd and the succeeding Governmental interferences were mere temporary delays and not frustrations and that the voyage was not frustrated until November 16th. Long before that time the cargo had not only been loaded but the telegraphic notice had been given, and the freight from every point of view had been indisputably earned and was payable.

Petitioners argue that, regardless of the decision of this Court in cases like *The Allanwilde* and *The Malcolm Baxter, Jr.,* the collection of freight under the prepaid freight clause despite frustration of the voyage is not allowed unless the vessel has broken ground before the frustration occurs. Here, however, they come squarely up against the contrary holdings of this Court in *The Gracie D. Chambers* and in *The Bris.* Therefore they ask a re-examination and overruling of those cases. The same argument was presented to this Court in those cases, and the Court

replied that the doctrine of *The Allanwilde* was not deflected by the fact that the vessel had not broken ground before the frustration. This Court in *The Gracie D. Chambers,* 248 U. S. 387 at p. 392 said:

> "The fact does not deflect the principle of those cases.* It was not made to depend upon the fact of breaking ground, but upon the bills of lading which provided for the payment of freight upon the shipment of the goods and the right to retain it though the goods were not carried, their carriage being prevented by causes beyond the control of the carrier."

Later, this Court, in *The Malcolm Baxter, Jr.,* 277 U. S. 323, followed *The Allanwilde* and companion cases and referred to them with approval.

The Charge of Injustice in the Decision Below is Without Substance.

There is nothing unjust in those decisions. In commerce, especially in war time, there are many hazards. Some one must take the chance of loss. It is far more just to let the parties provide by contract who shall take the loss than for a court to intervene and upset their arrangements. These prepaid freight clauses have long been recognized in the law as valid and enforceable. This Court in *The Allanwilde, The Gracie D. Chambers* and *The Bris,* all *supra,* disposed expressly of any contention of inequity or injustice in their enforcement.

The Texas Company v. *Hogarth Shipping Com-*

* Referring to two shipments and cases arising out of them on *The Allanwilde,* 248 U. S. 377 (Nos. 449 and 450).

pany, Ltd., 256 U. S. 619, and *The Tornado*, 108 U. S. 342, much relied upon by petitioners, are not in point.

As for *The Tornado*, there was in that case no prepaid freight clause. Of course the shipowner failed in his action for freight brought after the destruction of the ship, which made the performance of the contract of carriage impossible. There is nothing new in the citation of *The Tornado*. It was before this Court when *The Allanwilde* was decided.

The Texas Company case did not involve any question of prepaid freight. The vessel had been chartered and was thereafter requisitioned. The charterer sued the shipowner for damages for its failure to perform the charter. The claim was denied because there was no clause in that case, as in ours, putting the risk of frustration on either party.

In our case the prepaid freight clause did just that. It was a proper and recognized means of placing loss in such a case upon a shipper. If the shipper did not wish to run the risk of loss it could have insured the risk. By signing the contract which contained the clause, it took away from the shipowner the chance to insure, because when it took from the shipowner the contract which contained the prepaid freight clause, the shipowner no longer had an insurable interest in the freight.

In view of the repeated decisions by this Court in *The Allanwilde, The Gracie D. Chambers, The Bris* and *The Malcolm Baxter, Jr.*, we submit that there is nothing here to review.

As a Last Resort, Petitioners Charge That the Belgian Government Is the Real Party In Interest, and That In Collaboration With Purfina, It Connived With Purfina to Cheat Petitioners.

This charge requires, if it is to succeed, (1) that this Court disregard concurrent findings below; (2) that it disregard the testimony of a high official of the Belgian Government; (3) that it abandon its decision in *Compania Espanola* v. *The Navemar*, 303 U. S. 68.

Petitioners, at page 22 of their brief, seek to show that the Belgian Government, and not Purfina, was the real party in interest with respect to this freight money, and that Purfina is therefore estopped to recover. They charge the Circuit Court of Appeals with error because it sustained the District Court in finding that during the period when this freight money was earned the "Laurent Meeus" was being operated for Purfina's account and that the governmental directions were merely a political control (R. 750). Thus they recognize that this, the very foundation of the errors charged against the courts below, involves the request that this Court abandon its well established rule.

We should not omit to call the Court's attention to the fact that petitioners called as a witness Captain Rene Boel, the head of the Belgian Economic Mission, a Department of the Belgian Government located at London, England (R. 596), and a high official of the Belgian Government, who was charged with the administration of all Belgian vessels under requisition. Captain Boel testified that, even after the requisition of May, 1940, the owners of certain Belgian vessels, including the "Laurent Meeus", not-

withstanding the prior requisitions, were given authority to operate their vessels "for owners' account" (R. 634). This testimony from this high official of the Belgian Government, who was actually in charge of "handling different economic and shipping problems for the [Belgian] Government" (R. 596), and the findings below, based upon it (R. 750-1), differentiates this case from those cases which rest upon facts where a vessel is in the possession of and is operated by a Government. Such was not this case because according to the Findings there was no requisition of possession, operation or management of the vessel by the Belgian Government before November 16, 1940, that is, six weeks after the cargo was loaded. Prior thereto Purfina had possession of, and was operating and managing, the "Laurent Meeus" for its own account (R. 101-102, 750-751). It was not until November 16, 1940 that the Belgian Government took possession of the vessel (R. 71-77, 82-85) through the elaborate formalities given in the evidence (R. 288-292) and reviewed in the opinion of the Circuit Court of Appeals (R. 745-766).

Petitioners state that the Circuit Court of Appeals misunderstood the facts in *The Kabalo,* 67 Lloyd's List L. R. 572. Such was not the case, as appears from the affidavit of Baron de Cartier de Marchienne, the Belgian Ambassador to the United Kingdom, filed in that case (67 Lloyd's List L. R. at p. 574). The Ambassador stated that he was informed by Commandant Rene Boel (the same witness who testified in this case), that the "Kabalo" was requisitioned for public purposes, in particular for the purpose of using the ship in defense of the Belgian State, and that he was further informed that the vessel was, through her master and crew, in the possession of

the Belgian State for the purposes aforesaid. Captain Boel has testified to the exact contrary as to the relation between the "Laurent Meeus" and the Belgian Government. He has testified that the "Laurent Meeus" was one of certain vessels which the Belgian Government permitted to be operated for owners' account (R. 634).

Conclusion.

The hollowness of the complaint of the petitioners is apparent when we turn to Point VI of their brief (Brief, p. 39). There it is contended that the record discloses that the Belgian Government wished to hold the freight earned by the "Laurent Meeus" because they needed ready cash. They say:

> "there is no reason why the Government cannot now expropriate the funds and use them for whatever purposes it desires. In fact the very peremptoriness of the Government's demands for the freights justifies the suspicion that it was not so much interested in holding them for Purfina as in building up dollar exchange in the United States" (Petitioners' Brief, p. 40).

The Circuit Court of Appeals considered this contention and pronounced it "preposterous" (R. 753). It is submitted that when a case is so desperate that a charge of this character must be made against a friendly foreign Government in order to present it to this Court, that case should not be given any consideration. When that charge has been carefully considered by two painstaking courts and found without substance, there is every reason for this Court to decline to go into the matter further. The Belgian

Ambassador in his note, printed at pages 82 to 85 of the record, repudiated the charge.

The prepaid freight clause, the restraints of Princes clause, and the war shipping clauses are all well known provisions, inserted in contracts of affreightment to provide for the contingencies which occurred in this case. The purpose of inserting these provisions in contracts of affreightments is to inform the parties to the contract which of the parties must take the anticipated risks of loss, and thereby enable the party accepting the risk to provide against such loss, by taking out insurance against it. In the present case, when Purfina and Mitsubishi inserted in the charter party for the "Laurent Meeus" the prepaid freight provision, they agreed that the risk of the loss of freight should be on Mitsubishi. *The Allanwilde, The Gracie D. Chambers, The Malcolm Baxter, Jr., supra.* Having made that agreement, only Mitsubishi was in a position to insure against the loss of freight, because only Mitsubishi had an insurable interest in the freight. To set aside the rule thus established by this Court would again throw into confusion the law which the Court has settled in four cases.

It is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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